

The Administrative Law Judge denied liability against the Kansas Workers Compensation Fund. At oral argument before the Appeals Board the attorney for the respondent advised the Appeals Board that the respondent did not dispute the

Administrative Law Judge's Award in denying respondent any reimbursement from the Kansas Workers Compensation Fund and, as such, it was unnecessary for the Workers Compensation Fund to remain in this litigation. By agreement of the parties, the Workers Compensation Fund has been dismissed from this matter and is responsible only for its own attorney fees.

ISSUES

- (1) What, if any, is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a forty-two (42) year old high school graduate with eighteen (18) hours of college at Wichita State University, had been employed in the aircraft industry in a variety of jobs for approximately eighteen (18) years. His last employment with respondent ended on September 29, 1993 but the parties have stipulated to a date of accident of March 12, 1992. In his most recent work activity with respondent claimant was involved in work which required repetitive use of his hands. After becoming symptomatic in his hands, arms and shoulders, he reported his symptoms to his supervisor and was referred to the medical department at Boeing Central Medical. Claimant was ultimately referred to Dr. Paul Lesko who performed bilateral surgeries on claimant's hands and wrists which, unfortunately, were less than successful. Claimant returned to work after being released by Dr. Lesko but was terminated because of his medical restrictions. Claimant went through an unsuccessful vocational rehabilitation placement program and at the time of the regular hearing was unemployed.

Claimant was examined and/or treated by several doctors including Dr. Kenneth D. Zimmerman, a Boeing physician since 1960. Dr. Zimmerman first saw claimant for this condition on March 31, 1992, when claimant came in regarding complaints to his left side, left shoulder, neck and arm. He was diagnosed with left trapezius strain, left lateral epicondylitis and left wrist strain and was placed in therapy and on medication. Dr. Zimmerman ruled out carpal tunnel syndrome and returned claimant to work with restrictions of no lifting over thirty (30) pounds and limited overhead work.

Claimant was eventually referred to Dr. Paul Lesko, who first examined claimant relative to his upper extremity complaints on April 3, 1992. Dr. Lesko initially diagnosed claimant with carpal tunnel syndrome on the left with rotator cuff problems in the shoulder. Claimant was ultimately diagnosed with bilateral carpal tunnel syndrome and underwent a left carpal tunnel release on May 8, 1992 and a right carpal tunnel release on June 25, 1992. When Dr. Lesko last saw claimant he rated him at a twelve percent (12%) permanent impairment to each hand for the carpal tunnel, which converts to approximately an eight percent (8%) upper extremity general body disability. He placed permanent restrictions on claimant of limited use of power tools and twenty-five (25) pound bilateral lifting limitations due to the problems associated with the hands. Dr. Lesko also felt claimant was limited on a permanent basis in the right shoulder and assessed claimant an eight percent (8%) whole body functional impairment to the shoulder over and above the impairment rating to the hands.

Claimant was examined by Dr. Ernest Schlachter on August 26, 1993. Dr. Schlachter diagnosed bilateral carpal tunnel syndrome post surgery and found significant ongoing problems in claimant's left shoulder. He rated claimant at a five percent (5%) permanent partial impairment of function to the left shoulder, fifteen percent (15%)

permanent partial impairment to each upper extremity, which converted to a nine percent (9%) whole body impairment and opined claimant had a twenty-two percent (22%) permanent partial impairment of function to the body as a whole when all of the ratings were combined. He placed permanent restrictions on claimant of no repetitive twisting, pulling or grasping motions with either hand or arm; no use of vibrating tools or working cold environments; avoid repetitive lifting of more than ten (10) pounds with either hand or arm and fifteen (15) pounds on a single lift with either hand or arm. At the time of Dr. Schlachter's examination respondent had returned claimant to comparative wage employment with accommodation. Dr. Schlachter assessed no permanent impairment or restrictions pertaining to claimant's right shoulder.

Claimant was referred to workers compensation vocational experts Maurice Entwistle and James Molski for an evaluation of his loss of access to the open labor market and loss of ability to earn a comparable wage. See K.S.A. 44-510e. Mr. Entwistle, when evaluating carpal tunnel syndrome patients, assesses a standard twenty-five percent (25%) loss of access to the open labor market. In assessing claimant's wage loss Mr. Entwistle also takes into consideration the fact that the employees at Boeing are accustomed to a high wage scale and opines that certain adjustments need be made whenever a Boeing employee loses his or her job and returns to the open labor market. The Appeals Board, in reviewing the opinion of Mr. Entwistle, knows of no Kansas Workers Compensation statute or case law which mandates any type of reduction in future wage earning capability due to the claimant having been employed at a high wage job prior to his or her injury. The Appeals Board also finds questionable Mr. Entwistle's standard twenty-five percent (25%) labor market loss when dealing with bilateral carpal tunnel syndrome. It is difficult to fathom a labor market loss applicable to all employees who develop carpal tunnel syndrome when the background, training, education and work experience of individual employees across the state varies so widely.

Mr. Molski, in assessing claimant's loss of access to the open labor market, used the restrictions of the treating physician, Dr. Lesko, and found claimant to have suffered a fifty to fifty-five percent (50-55%) loss of ability to perform work in the open labor market. In using the restrictions placed upon claimant by Dr. Schlachter, Mr. Molski opined claimant had suffered a sixty-five to seventy percent (65-70%) loss of ability to perform work in the open labor market.

K.S.A. 1990 Supp. 44-510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

K.S.A. 44-501 and K.S.A. 44-508(g) make it the burden of the claimant to persuade the trier of facts by a preponderance of the credible evidence the claimant's right to an award of compensation by proving the various conditions upon which the claimant's right depends. See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984). In reviewing the evidence presented, the Appeals Board makes note of the fact Dr. Lesko, as treating physician, would have a better opportunity to assess claimant's ongoing limitations than would doctors who examined claimant on only a one time basis. In reviewing the opinion of Mr. Molski, the Appeals Board finds the opinion by Mr. Molski regarding claimant's loss of access to the open labor market, when using the restrictions of Dr. Lesko, the treating physician, are the more appropriate findings and the Appeals Board adopts same in finding claimant has suffered a fifty-two and one half percent

(52.5%) loss of ability to perform work in the open labor market. In computing claimant's loss of ability to earn a comparable wage, the Administrative Law Judge compared Mr. Molski's six dollars and fifty cents (\$6.50) per hour, two hundred sixty dollars per week (\$260.00), wage earning capacity to claimant's average weekly wage of nine hundred three dollars and twenty-four cents (\$903.24). Claimant's loss of ability to earn comparable wages, when considering these figures, is seventy-one percent (71%) and the Appeals Board adopts same as its own.

In determining the extent of permanent partial disability, both the reduction of the claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990). While *Hughes* indicates the balance of the two factors is required, it does not specifically state how this balance is to occur or what emphasis is to be placed upon each of the tests. Finding no compelling reason for placing more emphasis upon one factor over the other, the Appeals Board finds claimant's loss of ability to perform work in the open labor market and loss of ability to earn comparable wages should be given equal weight in this matter. In so computing claimant's fifty-two and one half percent (52.5%) loss of ability to perform work in the open labor market, and claimant's seventy-one percent (71%) loss of ability to earn a comparable wage, the Appeals Board finds claimant is entitled to a sixty-one and three-fourths percent (61.75%) permanent partial general body work disability for the injuries suffered while employed with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated August 28, 1995, shall be, and hereby is, modified and that an award of compensation is hereby made in accordance with the above findings in favor of the claimant, Jeffery Mann, and against the respondent, The Boeing Company-Wichita, and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury occurring on March 12, 1992.

Claimant is entitled to 50 weeks temporary total disability compensation at the rate of \$289.00 per week, totalling \$14,450.00, followed thereafter by compensation at the rate of \$289.00 per week for a total award not to exceed \$100,000.00 for a 61.75% permanent partial general body work disability.

As of January 26, 1996, there would be due and owing claimant 50 weeks temporary total disability compensation at the rate of \$289.00 per week in the sum of \$14,450.00 followed thereafter by 152.29 weeks permanent partial general body disability compensation at the rate of \$289 per week in the sum of \$44,011.81, totalling \$58,461.81, which is due and owing and ordered paid in one lump sum less any amounts previously paid.

Thereafter, the remaining balance of \$41,538.19 should be paid at the rate of \$289.00 per week for 143.73 weeks until fully paid or further order of the Director.

Claimant is entitled to unauthorized medical up to \$350.00 upon presentation of an itemized statement verifying same.

Future medical benefits are awarded upon application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fee contract is herein approved insofar as it is not in contravention to K.S.A. 44-536.

Per the earlier stipulation of the parties, the Kansas Workers Compensation Fund has no liability in this matter with the exception of the cost of its own attorney fees.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Barber & Associates	
Transcript of Regular Hearing	\$308.40
Ireland Court Reporting	
Deposition of Karla Schroeder	\$203.70
Deposition of Jeffery Mann	\$155.00
Deposition of Ernest Schlachter, M.D.	\$117.40
Don K. Smith and Associates	
Deposition of Maurice Entwistle	\$172.75
Deposition of Kenneth Zimmerman, M.D.	\$376.75
Deposition of Maurice Entwistle	\$229.00
Deposition of Paul Lesko, M.D.	\$199.00
Kelly York & Associates, Ltd.	
Deposition of James Molski	\$200.35
Court Reporting Service	
Deposition of James Molski	\$142.00

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James P. Johnston, Wichita, Kansas
Eric K. Kuhn, Wichita, Kansas
Cortland Q. Clotfelter, Wichita, Kansas
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director